



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

March 5, 1998

Mr. David R. Gipson  
Assistant General Counsel  
Texas Department of Agriculture  
P.O. Box 12847  
Austin, Texas 78711

OR98-0599

Dear Mr. Gipson:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 112949.

The Texas Department of Agriculture (the "department") received a request for all reports and test results, documentation, correspondence, opinions and status relating to TDA Incident No. 2424-01-97-0014. You claim that a portion of the requested information is excepted from disclosure under sections 552.101, 552.107, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

You contend that the documents at issue constitute attorney work product and should be excepted from disclosure under section 552.111. A governmental body may withhold attorney work product from disclosure under section 552.111 if it demonstrates that the material was 1) created for trial or in anticipation of civil litigation, and 2) consists of or tends to reveal an attorney's mental processes, conclusions and legal theories. Open Records Decision No. 647 (1996). The first prong of the work product test, which requires a governmental body to show that the documents at issue were created in anticipation of litigation, has two parts. A governmental body must demonstrate that 1) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation that there was a substantial chance that litigation would ensue, and 2) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and conducted the investigation for the purpose of preparing for such litigation. Open Records Decision No. 647 (1996) at 4. The second prong of the work product test requires the governmental body to show that the documents at issue tend to reveal the attorney's mental processes, conclusions and legal theories.

You state that the documents that you have submitted as work product were created in anticipation of litigation. We have reviewed the documents and note that the content of the documents indicates that they were created in anticipation of the department's litigation against Seagraves Spraying Service. It is also clear that most of the documents reflect the attorney's mental processes, conclusions and legal theories. However, we note that facts acquired by an attorney are not protected under the work product doctrine. *Owens-Corning Fiberglas v. Caldwell*, 818 S.W.2d 749, 750 n.2 (Tex.1991); *see also Leede Oil & Gas, Inc. v. McCorkle*, 789 S.W.2d 686, 687 (Tex. App.--Houston [1st Dist.] 1990 no writ) (work product privilege did not protect memoranda prepared by attorney that contained only "neutral recitals" of fact); Open Records Decision 647 (1996) at 4. Thus, we conclude that the department may withhold the information we have marked from disclosure under section 552.111 as attorney work product. The remaining information must be released to the requestor as a neutral recital of fact.<sup>1</sup>

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied on as a previous determination regarding any other records. If you have any questions regarding this ruling, please contact our office.

Yours very truly,



Michael A. Pearle  
Assistant Attorney General  
Open Records Division

MAP/ch

Ref.: ID# 112949

Enclosures: Submitted documents

cc: Mr. Kerry Porter  
U.S. Aviation Underwriters, Inc.  
15303 Dallas Parkway, Suite 1370  
Dallas, Texas 75248  
(w/o enclosures)

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<sup>1</sup>You also raise sections 552.101 and 552.107 for the submitted document. We conclude the information not covered by section 552.111 as attorney work product does not constitute legal advice or opinion or a client confidence so as to be protected under section 552.107, nor do we believe the information is confidential by law under section 552.101.